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No. ~~770~~ 54

In the Supreme Court of the United States

OCTOBER TERM, 1959

CARL BRADEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A, pp. 22–35) is reported at 272 F. 2d 653.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1959 (Pet. App. B, p. 36), and a petition for rehearing was denied on January 12, 1960 (R. 193). On February 2, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including March 12, 1960. The petition was filed on March 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the House Committee on Un-American Activities was validly authorized to conduct congressional investigations and whether the subcommittee holding hearings in Atlanta on Communist infiltration of southern industry was pursuing a valid legislative purpose under that authorization.

2. Whether the questions which the petitioner refused to answer were pertinent to a valid inquiry or whether they infringed his rights under the First Amendment.

3. Whether the petitioner's alleged reliance on this Court's decision in *Watkins* v. *United States*, 354 U.S. 178, justified his refusal to answer.

4. Whether the indictment was defective.

STATUTE AND RULE INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent provisions of Rule XI of the House of Representatives, H. Res. 5, 85th Cong., 1st sess., are set forth in Appendix C to the Petition for Certiorari (Pet. 37–38).

STATEMENT

The petitioner was charged in a six-count indictment (R. 6–7) with having knowingly, wilfully and unlawfully refused to answer six questions pertinent to the matters under inquiry by a subcommittee of the Committee on Un-American Activities of the House of Representatives.[1] Following a trial by jury, the petitioner was found guilty on all six counts (R. 16) and was sentenced to twelve months' im-

[1] The Committee had reported the petitioner's contumacy to the House of Representatives (H. Rept. No. 2584, 85th

prisonment on each count, the sentences to run concurrently (R. 114–115). On appeal to the Court of Appeals, his conviction was affirmed (Pet. App. A, pp. 22–35; 272 F. 2d 653).

The pertinent facts may be summarized as follows:

Pursuant to an authorization from the full Committee (G. Ex. 6), a subcommittee of the Committee on Un-American Activities conducted public hearings in Atlanta, Georgia, on July 29, 30 and 31, 1958, for the purpose of inquiring into "[t]he extent, character and objects of Communist colonization and infiltration in the textile and other basic industries located in the South, and Communist Party propaganda activities in the South" (G. Ex. 10, pp. 2605–2606; G. Ex. 9, R. 124–125).[2]

The petitioner appeared before the subcommittee on July 30, in response to a subpoena served upon him in Rhode Island (G. Ex. 10, p. 2667; G. Ex. 9, R. 130–132). At that time the Committee had information that the petitioner was a member of the Communist Party; that he was engaged as a Communist with an organization known as the Southern Conference Educational Fund, in whose behalf he traveled through-

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Cong., 2d sess. (G. Ex. 9)) and the House had resolved to direct the Speaker to certify the Committee's report to the United States Attorney (H. Res. 686, 85th Cong., 2d sess. (G. Ex. 13)).

[2] Government Exhibit 10 is the printed transcript of the Hearings before the Committee on Un-American Activities, House of Representatives, 85th Cong., 2d sess., July 29, 30, and 31, 1958, entitled, *Communist Infiltration and Activities in the South*. Government Exhibit 9 is House Report No. 2584, which contains excerpts from Government Exhibit 10. Pertinent excerpts from Government Exhibit 9 appear in the printed record at R. 123–168.

out the South as a field representative, disseminating Communist propaganda and doing Party work (R. 41). The Southern Conference Educational Fund was a successor organization to the Southern Conference for Human Welfare. This latter organization had been cited by another Congressional committee as a Communist-front organization (R. 41).

In addition to this information, the Committee had been informed that the petitioner was a contributor to the *Southern Newsletter,* believed by the Committee to be published by Communists (R. 41), and the Committee had reason to believe that he might be connected with the distribution of this publication throughout the South (see R. 46–47). It was also the Committee's understanding that the petitioner had recently traveled to Rhode Island to meet with Mr. Harvey O'Connor, the national chairman of an organization known as the Emergency Civil Liberties Committee (R. 42). Mr. O'Connor had been identified under oath in testimony before the Committee as a member of the Communist Party (R. 46, 48), and the Emergency Civil Liberties Committee had been cited by the Senate Subcommittee on Internal Security as a Communist-front organization (R. 48).

After the petitioner was sworn, he admitted that he was employed as a field secretary for the Southern Conference Educational Fund and that he had been visiting with Harvey O'Connor in Rhode Island when he was subpoenaed to appear before the Committee (G. Ex. 9, R. 132-133, 135; G. Ex. 10, pp. 2667–2668). He refused, however, to tell the subcommittee where he had been immediately before his departure to

Rhode Island to confer with O'Connor (G. Ex. 9, R. 136; G. Ex 10, pp. 2668–2669) or whether he was, at the time of his appearance before them, a member of the Communist Party (G. Ex. 9, R. 139; G. Ex. 10, p. 2670), asserting that "this is not pertinent to any possible investigation that this committee might be conducting" and that "I also believe that it is an invasion of my right to associate under the first amendment" (G. Ex. 9, R. 136; G. Ex. 10, p. 2669).

As his interrogation proceeded, he admitted that he had been in the Atlanta area in December, 1957, and that the Southern Conference Educational Fund had held a meeting in the American Red Cross Building in Atlanta at that time but he refused to tell the subcommittee whether he had participated at that meeting (count I) or who had solicited the quarters to be made available to the Southern Conference Educational Fund for the meeting (count II) (G. Ex. 9, R. 153–154, 159; G. Ex. 10, pp. 2675, 2677). He was then asked, but refused to answer, whether he was connected with the Emergency Civil Liberties Committee (count III) and whether he had developed plans and strategies for that organization during his recent conferences with Harvey O'Connor in Rhode Island (count IV) (G. Ex. 9, R. 160–161; G. Ex. 10, p. 2678). The staff director of the Committee, Mr. Arens, then exhibited to the petitioner a circular letter which bore his signature and that of his wife. The letter was addressed to "Dear Friend" and urged its recipients to write to their Senators and Representatives to ask them to oppose a number of bills relating to the field of internal security which were

then pending before Congress. The petitioner was asked whether he was a member of the Communist Party when he affixed his signature to this letter. He refused to answer the question (count V) (G. Ex. 9, R. 161–164; G. Ex. 10, pp. 2678–2679). He also refused to tell the subcommittee whether he was connected in any way with the *Southern Newsletter* (count VI) (G. Ex. 9, R. 164–165; G. Ex. 10, p. 2679).

Immediately following the petitioner's initial refusal to answer on grounds of impertinency (*supra*, p. 5), the staff director of the Committee explained the pertinency of the questions to him, pointing out that the Committee was considering and studying a number of legislative proposals designed to tighten the security laws with respect to registration of Communists, the dissemination of Communist propaganda and the prohibition of certain types of activities which the Committee understood the petitioner himself had been engaged in. The explanation concluded (G. Ex. 9, R. 136–138; G. Ex. 10, 2669):

> It is * * * for these reasons * * * that this committee has come to Atlanta, Georgia, for the purpose of assembling factual material which the committee can use * * * in appraising the administration and operation of the laws and in making a studied judgment upon whether or not the current provisions of the laws are adequate and whether or not * * * these proposals pending before the committee should be recommended for enactment.

It was made clear and understood by the petitioner that this explanation of pertinency was to be appli-

cable to all of the questions which the subcommittee would propound to him (G. Ex. 9, R. 140–141, 153, 156, 160; G. Ex. 10, pp. 2670–2671, 2675, 2676, 2678), and that he was being specifically directed to answer each of the questions (G. Ex. 9, R. 149–150, R. 154–155, 160; G. Ex. 10, pp. 2674, 2676, 2678). The petitioner, however, persisted in his refusals to answer the questions, relying on the same grounds which he had asserted initially (see *supra*, p. 5), *i.e.*, their alleged lack of pertinency and violation of his freedom of association under the First Amendment[3] (G. Ex. 9, R. 154, 159, 161–162, 164, 165; G. Ex. 10, pp. 2675, 2677–2680). He did not rely on his Fifth Amendment privilege against self-incrimination as a basis for refusing to answer any of the Committee's inquiries (G. Ex. 9, R. 140, 141–142; G. Ex. 10, pp. 2670, 2671).

ARGUMENT

1. Insofar as the petitioner attacks the authority of the Un-American Activities Committee and the legality of the particular investigation by the subcommittee before which he was subpoenaed, and insofar as the petitioner seeks to justify his refusal to answer questions on the ground of impertinency[4] or

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[3] He added, as an additional objection to the question relating to his connection with the *Southern Newsletter* (*supra*, p. 6), that he believed it was an invasion of the freedom of the press (G. Ex. 9, R. 165; G. Ex. 10, p. 2679).

[4] With respect to the issue of the pertinency of the questions which the petitioner refused to answer, while some of them, *i.e.*, the questions recited in counts I and II, dealt with preliminary inquiries which were intended as a foundation for other questions (R. 47–48), there can be no question about the pertinency of the question listed in count V which was, "Were

of infringement of his rights under the First Amendment, we believe that this case is controlled by this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109. In fact, the petitioner specifically asks the Court to reconsider its decision in *Barenblatt* (Pet. 2, 16–18). Earlier in this term this Court refused a similar plea. *Davis* v. *United States*, 361 U.S. 919. No additional reason for reconsideration is presented by this case.

2. The petitioner argues that his refusal to testify took place before this Court's decision in *Barenblatt* and that he was justified, on the basis of the earlier decision in *Watkins* v. *United States*, 354 U.S. 178, in believing that the pertinency of the questions to a legitimate legislative purpose was not sufficiently shown to require him to answer. This argument overlooks the fact that his case is distinguishable from *Watkins* in that the pertinency of his testimony was specifically spelled out to him. *Supra*, p. 6. The petitioner's argument carries the implication that *Watkins* was overruled by *Barenblatt*, an assumption directly contrary to the specific statement of the Court. 360 U.S. 109, 123–125. In any event, it was specifically held in *Sinclair* v. *United States*, 279 U.S.

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you a member of the Communist Party the instant you affixed your signature to that letter?" This is the very type of question dealt with in *Barenblatt*. Since the petitioner received concurrent sentences on all the counts, the judgment could not be successfully attacked if he had been properly found guilty only on count V. Therefore it is not necessary to examine further into the pertinency of any of the other questions. *Barenblatt* v. *United States*, 360 U.S. 109, 115; *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6.

263, 299, that a "mistaken view of the law is no defense" in this type of offense.

3. The issues which the petitioner presents with respect to the sufficiency of the indictment and the bill of particulars, and the absence of proof as to a specific direction to answer, are insubstantial. The indictment alleged that "the Defendant knowingly, wilfully and unlawfully refused to answer * * * pertinent questions" (R. 6), and although the factual basis supporting pertinency was not set forth,[5] a bill of particulars was filed (R. 12). The petitioner now complains that the bill of particulars was inadequate (Pet. 20), but no complaint was made at the time. As to the specific direction to answer, the record is clear that the petitioner was fully informed that the Committee was in fact requiring him to answer each of the questions involved (R. 149–150, 154–155, 160). In fact, the petitioner specifically stated, "I will understand that you are directing me to answer each question in order to expedite the matter" (R. 155).

4. The petitioner's testimony before the House subcommittee immediately preceded that of Frank Wilkinson, whose refusal to answer the questions addressed to him led to his prosecution and conviction for the same offense as is here involved. The judgment of the Court of Appeals for the Fifth Circuit

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[5] It has been held that an indictment under 2 U.S.C. 192 need not specifically set forth these matters. *Sacher* v. *United States*, 252 F. 2d 828, 830–831 (C.A.D.C.), reversed on other grounds, 356 U.S. 576; *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A.D.C.), reversed on other grounds, 354 U.S. 930; *United States* v. *Josephson*, 165 F. 2d 82, 84–85 (C.A. 2), certiorari denied, 333 U.S. 838.

upholding that conviction was the subject of a petition for a writ of certiorari (No. 703, this Term) which this Court granted on March 28. Although the petition in that case presents a variety of questions, the principal issue urged by the petition which does not appear to have been covered by this Court's decision in *Barenblatt* involves the argument that the Un-American Activities Committee had no authority to investigate propaganda activities against itself. See Pet. in No. 703, pp. 7–10. While we do not agree that the *Wilkinson* record actually raises that issue, and while we are, of course, not certain as to the Court's reasons for granting certiorari in *Wilkinson*, it appears from the face of that petition (as well as from the earlier denial of certiorari in *Davis* v. *United States*, 361 U.S. 919, where the petitioner had asked for reconsideration or interpretation of *Barenblatt*) that the issue probably leading to the grant in *Wilkinson* is one which cannot in any event be said to be present here on the record of this case.* On that basis, we oppose the grant of certiorari in this case with the suggestion that if the Court believes the

*In the trial of the case in the district court the Staff Director of the Committee testified, "In addition to that it was our information that Mr. Braden, and again my recollection is not absolutely clear, but it is in general that he had something to do with the preparation and dissemination of [petitions] which were circulated in the Southland for the purpose of precluding or attempting to preclude or softening the very hearings which we proposed to have here" (R. 43). However, in explaining to the petitioner the pertinency of his testimony at the hearing before the subcommittee, there is no suggestion that interference with, or propaganda against, the Committee was a matter being looked into (R. 136–138).

issues here will be affected by its consideration of the issues in *Wilkinson,* it withhold action on this petition until that case has been argued and decided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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